Supreme Court, U.S.
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No. 00-1729

IN THE

# Supreme Court of the United States

ANN BOGREN,

*Petitioner,*

*v.*

THE STATE OF MINNESOTA; DEPARTMENT OF PUBLIC SAFETY; DONALD DAVIS, Commissioner of the Department of Public Safety, in his official capacity; MINNESOTA STATE PATROL; ANN BEERS, Chief of the State Patrol, in her official capacity; LIEUTENANT THOMAS FRASER OF THE STATE PATROL, personally and individually; LIEUTENANT LORI HODAPP OF THE STATE PATROL, personally and individually; and LIEUTENANT COLONEL STEPHEN MENGELKOCH OF THE STATE PATROL, personally and individually,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS LIEUTENANT THOMAS FRASER AND LIEUTENANT LORI HODAPP

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## STATEMENT OF THE CASE

Petitioner Ann Bogren, a black female, entered the Minnesota State Patrol Training via a Peace Officers Career Opportunity Training Program (POCOP), in June 1994. POCOP was specifically developed and administered by the Minnesota law enforcement community in an effort to recruit non-traditional applicants, including women and minorities, to careers in law enforcement. (*See* Respondents' Lodging L-3; hereinafter "Resp. L-__".) POCOP is a twenty-two week program that provided the classroom and training skills necessary to qualify for licensure, a prerequisite for admission to the State Patrol's Training Academy. (*Id.*)

Petitioner completed the POCOP program in November 1994 and began a fifteen-week training regimen at the State Patrol Training Academy. (Resp L-4) Bogren completed the Training Academy, graduating 23rd out of 27 cadets, and was sworn in as a Minnesota State Trooper on February 25, 1995, beginning her mandated one-year probationary period. (Resp. L-1) During this same time, the Minnesota Department of Public Safety launched an investigation into the training environment at the academy. (Resp. L-8-15) This investigation was in response to two former cadets claims of gender harassment and discriminatory conduct. (*Id.*) Petitioner was interviewed during this investigation but did not identify any incidents where she was harassed or discriminated against. (*Id.*) Petitioner explained that while there were incidents at the Academy which she found inappropriate, she did not believe they were directed solely at females. (Resp. L-16-24) Petitioner identified some situations where she felt she was treated differently than other cadets but those situations were not race or gender based. (*Id.*) Petitioner also stated that the instructors often made sexual comments, yet none of the comments were

ever directed towards her. (Resp. L-20) At no time in this interview did Petitioner state that she was personally treated differently because of her race or sex. (Resp. L-7, 16-24)

After her February 25, 1995 graduation from the Academy, Petitioner immediately began her field training: a standardized, structured, four-step plan in a geographic area she would eventually patrol, and was assigned to field training officers (FTO) who oversaw her performance. At the beginning of Petitioner's probationary period, her evaluations were fairly positive, but more than one identified her driving skills as an area requiring improvement. (Pet. A-63, 65-71)[1] Towards the end of her probationary period, Petitioner received much more criticism and had developed an antagonistic relationship with her primary FTO, Trooper Brian Polansky. (Resp. L-25-32; Pet. A-66-67) Petitioner admitted that tension had developed between herself and Polansky. Petitioner's driving performance regressed during the final phase of her field training period, and Polansky documented several traffic violations by Petitioner that occurred on an almost daily basis, despite his instructions on the necessity of avoiding such violations. (*Id.*)

Polansky observed that Petitioner had difficulty paying attention to traffic signals and operating the vehicle while, at the same time, monitoring the radio and performing her job. (Resp. L-27-28) The FTOs also expressed concerns in a number of other areas including inadequate driving skills, inability to accept constructive criticism, personal conflicts, anger management and lack of candor and truthfulness. (Resp. L-98-103) Polansky felt that Petitioner reacted with resistance when he evaluated her performance after each traffic stop. (Resp. L-28)

1. "Pet. A-#" refers to the Petitioner's Appendix which was submitted with its Petition for Writ of Certiorari.

Despite these concerns, Petitioner advanced in May 1995, beyond the field training program, was assigned a solo patrol car and started her solo patrol. As a solo probationary patrol officer, Petitioner generally received satisfactory marks from her initial supervising lieutenant, Lieutenant Al Kutz, however her driving problems continued to be a concern. (Pet. A-63-72; Resp. L-32-36) Petitioner was involved in an incident where she hit a metering ramp light and knocked it over. (Resp. L-35) Petitioner admitted hitting the light but was hesitant to file an accident report with the patrol. (Resp. L-35, 38) Petitioner had to be coaxed to make the report but ultimately did file the report on the day of the accident. (*Id.*) Lieutenant Kutz later questioned Petitioner about the accident and specifically asked whether any damage had occurred to her patrol car. (*Id.*) Petitioner denied damage but upon Lt. Kutz's inspection, he noted that there was some. (Resp. L-35) Petitioner was also involved in an incident in August 1995, in which she made a U-turn on an interstate entrance, causing two other vehicles to crash. (Resp. L-100)

The final incident leading to Petitioner's non-certification involved a domestic incident with her former boyfriend, Steve Johnson. Subsequently, based on a review of her performance, Petitioner was non-certified as a probationary trooper with the Minnesota State Patrol. (Pet. A-171) The decision to give Petitioner the option of resigning or to be non-certified was based on Petitioner's entire performance record, including the domestic incident and all the incidents that led up to the domestic incident. (Pet. A-171-172)

Lieutenant Fraser and Hodapp had extremely limited contact with Petitioner. For the major part of Petitioner's tenure with the patrol, Kutz was Petitioner's immediate supervisor and oversaw her performance which was documented by different FTOs. (Resp. L-34) In his affidavit, Fraser stated that he only

had direct supervisory responsibility over Petitioner for the three week period between when Lt. Kutz left and Hodapp assumed Lt. Kutz's responsibilities. (Resp. L-94) In October 1995, Hodapp replaced Lt. Kutz as Petitioner's supervisor. (Resp. L-96-97) Captain Stephen Mengelkoch was Fraser's and Hodapp's immediate supervisor. Fraser investigated the domestic incident between Petitioner and Steve Johnson, and Hodapp wrote the supervisor's report dated November 11, 1995, which summarized Petitioner's performance. (Resp. L-93-97)

On October 22, 1995, while off-duty, Petitioner went to the home of her former boyfriend, Steve Johnson, to retrieve a set of keys. (Resp. L-58, 69) While in Johnson's house, Petitioner attempted to take a set of oriental tea cups she had previously given Johnson, and an argument ensued. (Resp. L-72) As Petitioner left, the tea cups were broken and Johnson called the Columbia Heights Police Department to report the cup-breaking incident. (Resp. L-51-52) Johnson also called the patrol office and left a message complaining about Petitioner's conduct. (Resp. L-94) In the early morning hours of October 23, 1995, Fraser received a call notifying him that Johnson was calling the patrol office regarding a complaint on Petitioner. (*Id.*) Fraser was given Johnson's home telephone number and proceeded to call it. (Resp. L-85, 88, 90, 91, 94) The number was continually busy. (Resp. L-85, 91) In the meantime, Johnson called the patrol again and gave his cell phone number to the dispatcher. (Resp. L-91, 94) Fraser did not know Johnson but Johnson identified himself as Petitioner's ex-boyfriend. (Resp. L-92) When Fraser was finally able to contact Johnson, Johnson told Fraser that Petitioner came into Johnson's house yelling at Johnson, calling Johnson's new girlfriend names and breaking four Japanese souvenir mugs on the floor. (Resp. L-94) Johnson told Fraser that the local police had been called. (Resp. L-92, 94) Fraser tried calling Petitioner

regarding Johnson's complaint. (*Id.*) Fraser did call the Columbia Heights police and learned that the police had issued a citation to Petitioner for criminal damage to property. (Resp. L-87, 94) Petitioner admitted to the Columbia Heights police officer who contacted her that she was at Johnson's home, that an argument occurred and that cups were broken. (Resp. L-51-52)

The next morning Fraser informed his superior, Captain Mengelkoch, of the altercation between Petitioner and Johnson. (Resp. L-94) To Mengelkoch, the altercation between Petitioner and Johnson was extremely important. (Resp. L-45, 48; Pet. A-10) He felt that the incident in and of itself was enough to have a probationary employee non-certified. (*Id.*) Mengelkoch, in consultation with Chief Chabries, ordered an internal investigation into the matter. (Resp. L-45). Fraser was assigned the task of conducting the investigation. (Resp. L-37-38, 48- 49; Pet. A-106-107)

On November 1, 1995, Fraser conducted a taped interview with Petitioner. (Resp. L-55-83, 94) Petitioner's attorney was present when the statement was taken. *Id.* In her statement, Petitioner admitted to going over to Johnson's house on the night of October 22, 1995, looking in the window to see if he was at home, knocking at the door, being let in, and arguing with Johnson. (Resp. L-61, 64) In his interview with Fraser, Johnson stated that Petitioner asked Johnson what he was doing with his "white bitch" girlfriend. (Resp. L-61, 86) Ultimately, some of Johnson's mugs were broken in the altercation. (Resp. L-53, 61) Petitioner admitted that she was upset and angry during the incident. (Resp. L-63-64) Fraser felt that many of Petitioner's answers were less than forthright. Fraser was troubled by two major incidents in the interview. (Resp. L-88) First, petitioner's evasiveness and untruthfulness in regard to Fraser's questions about her anger counseling.

(Resp. L-65-66, 88) Fraser was very specific as to the sex, location and the employer of the anger counselor, and yet Petitioner denied it all. (*Id.*) She denied seeking an anger counselor but after Fraser rephrased the question, and she consulted with her attorney, she admitted to seeking a counselor "who specializes in anger to how someone deals with it." (*Id.*) The other incident that troubled Fraser was in regards to the "breakup" with Johnson. (*Id.*) She initially denied that they had broke up approximately two months or eight weeks before the tea cup incident. (Resp. L-56) However, through follow up questions she admitted that six weeks prior to the tea cup incident there was a conversation which led to a "separation." (Resp. L-78) Fraser believed this subsequent answer made the first answer at least evasive, if not a lie. (Resp. L-84-89) Fraser found Petitioner's overall candor and truthfulness was questionable at best, and that her evasiveness was obvious and that it impeded the investigation. (*Id.*) Fraser submitted his report to the Patrol on November 3, 1995. (*Id.*)

On November 8, 1995, Petitioner was given the option to resign or not be certified. (Resp. L-50) This decision was made by Chief Chabries. (Resp. L- 50; Pet. A- 171-72) Chabries stated in an affidavit that he made the termination decision based on conversations with and reports by Hodapp, Fraser and Mengelkoch. (Pet. A-171-72) At Petitioner's attorney's request, Petitioner was given until November 14, 1995 to make her final decision. (Resp. L-47, 50) In the meantime, Mengelkoch assigned Hodapp the task of writing a report for Petitioner's attorney, which summarized the patrol's reasons for Petitioner's non-certification. (Resp. L-49-50, 97) Mengelkoch assigned this task to Hodapp because of her writing ability. (*Id.*) Neither Fraser nor Mengelkoch directed Hodapp on what should go into the report. (Resp. L-49, 97) Hodapp was merely instructed to pull the files together and document Petitioner's performance and the patrol's recommendation in concise report. (*Id.*)

Hodapp did as instructed and based on the information already in Petitioner's file, wrote a Supervisor's Report of Probationary Trooper Ann Bogren. (Resp. L-98-103) This report summarizes Petitioner's performance issues with the patrol. Most of the issues summarized in the report occurred while Lt. Kutz was Petitioner's supervisor. (*Id.*) These issues included, but are not limited to, personal conflict Petitioner had with Polansky; the accident on May 24, 1995 where Petitioner knocked over a ramp metering light; an accident in August 1995; a hit and run investigation complaint; damage to Petitioner's squad care; and the internal affairs investigation regarding the Johnson incident. (Resp. L-100-01) The report concluded with the recommendation of the supervisory staff of District 2500 that Petitioner should either resign or be non-certified. (Resp. L-50, 103)

On November 14, 1995, Petitioner and her attorney met with Captain Halverson and Mengelkoch. (Resp. L-47, 50) At the conclusion of this meeting, Petitioner's probationary appointment was non-certified for non-discriminatory reasons. (Resp. L-104) Shortly, after her termination, Petitioner pleaded guilty to the reduced charge of petty misdemeanor criminal damage to property. Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and on December 15, 1997, the EEOC issued a right to sue letter. Petitioner then filed suit.

## REASONS FOR DENYING THE WRIT

**1. The letter of violation written by a director of EEOC, on behalf of the Commissioner of the EEOC, finding that the evidence establishes that the defendant discriminated against petitioner does not mandate a denial of defendant's motion for summary judgment because it does not automatically create a genuine issue of material fact.**

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Harvey v. Anheuser-Busch, Inc*, 38 F.3d 968, 971 (8th Cir. 1994) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). It follows that, if the party does not meet this burden the fact finder may award summary judgment to the moving party. The mere existence of an Equal Employment Opportunity Commission (EEOC) letter of violation does not disturb the party's burden or this ability of the fact finder. Contrary to Petitioner's assertion, rather than disagreement among the circuits, each jurisdiction unanimously agrees that neither an EEOC letter of violation nor probable cause finding mandates the denial of summary judgment, or automatically allows the moving party to reach their burden of proof.

Congress enacted the EEOC procedures assuming that "administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases." *Moteles v. Univ. of Pennsylvania,* 730 F.2d 913 (3d Cir. 1984). Certain jurisdictions have also recognized this special ability and found the EEOC investigation and expertise acquired by its field investigators in the area of discriminatory

employment practices, makes any findings of discrimination highly probative of the ultimate issue involved in such cases. *See Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972). But despite this expertise, EEOC findings "are not homogeneous products; they vary greatly in quality and factual detail." *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1308 (8th Cir. 1984). The uncertain nature and quality of these findings makes it an absurd suggestion that every jurisdiction must be required to allow the non-moving party to survive summary judgment by simply introducing a letter of violation or probable cause finding. Such a mandate would eviscerate the judicial system as we know it. Rather than encourage the EEOC's conciliation efforts as Petitioner suggests, every case for which the EEOC issues a probable cause determination would, by definition, go to a jury. The moving party would have no defense, and summary judgment could never be used to eliminate meritless discrimination claims. This Court cannot support such a result.

The disagreement among the circuits revolves around whether an EEOC finding is *per se* admissible in Title VII cases, and not whether summary judgment should always be defeated if a probable cause finding exists. Even those courts that believe such a finding is always admissible, do not take away the courts discretion to decide whether the independent facts before the district court establish a genuine issue of material fact. *See e.g., Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000); *Smith v. Universal Services, Inc.*, 454 F.2d 154, 156-158 (5th Cir. 1972). The trial courts ultimate function would be eliminated if the nonmoving party's claims were allowed to go forward based only on the EEOC finding, when the rest of the evidence before the court does not support this finding. The justice system would buckle under the load of meritless discrimination cases that would have to be tried.

When the panel decided petitioner's case must fail because she did "not present sufficient evidence from which a reasonable fact finder could disbelieve the state's nondiscriminatory explanation for her termination," it was perfectly in line with Eighth Circuit, as well as all other circuits that have held a probable cause finding is not determinative of discrimination, and that there must be other independent evidence to survive summary judgment. *See Bassett v. City of Minneapolis*, 211 F.3d 1097, 1104 (8th Cir. 2000); *see also Simms v. Oklahoma ex rel. Department of Mental Health & Substance*, 165 F.3d 1321 (10th Cir. 1999); *Nerenberg v. RICA of Southern Maryland*, 570 A.2d 655 (Md. App. 2000). "When the independent facts before the district court judge fail to establish a genuine issue of material fact, a favorable EEOC letter of determination does not create one." *Simms*, 165 F.3d at 1331.

The Fourth Circuit supports this view and has consistently held that even when the EEOC finds probable cause and issues a right-to-sue letter, summary judgment may be appropriate. *See e.g., Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988). When there is no actual proof sufficient to support a jury verdict, the trial court may correctly grant summary judgment. *See id.* The court believes that if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

The quality, and or factual basis of the EEOC finding has caused courts within the same circuit to view the probative value of the finding differently. In the Ninth Circuit, in *Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000), the court explained that although the EEOC letter can be a "highly probative evaluation of an individual's discrimination complaint" it could not be determined from the letter in that case "what facts the

EEOC had considered" or how it had analyzed those facts. Therefore, the quality of the letter did not allow the nonmoving party to survive summary judgment. However, in *Gifford* the Ninth Circuit found the EEOC's reasonable cause finding to be sufficient to create an issue of fact on the question of whether male employees had been treated differently. *See Gifford v. Atchison*, 685 F.2d 1149, 1156 (9th Cir. 1982). These differing results demonstrate that the determination of whether the EEOC finding presents sufficient evidence to allow the nonmoving party to withstand summary judgment is heavily fact based, and a case specific issue. In all cases, the trier of fact makes the final decision, and the simple existence of a probable cause finding does not automatically create a genuine issue for trial.

The Tenth Circuit has found EEOC findings "highly probative" but has also required there to be "independent facts before the district court" which establish a genuine issue of material fact. *Simms v. Oklahoma ex rel. Department of Mental Health & Substance*, 165 F.3d 1321, 1331 (10th Cir. 1999); *see Cervantes v. Wal-mart Stores, Inc.*, 2001 U.S. App. LEXIS 63 (10th Cir. Jan. 3, 2001). In the unpublished opinion for *Cervantes*, the court explained that the case would be remanded so that the trial court could consider the EEOC report because such reports have "probative value." *See Cervantes*. However, the court did not say that the nonmoving party would automatically survive summary judgment on reversal, but only that the trial court had to consider the report and then explain why it was "according no credence to [that] report." *See id.*

The Fifth Circuit is also very supportive of EEOC findings but realizes their limitations. In *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), the court recognized that EEOC findings are "highly probative of the ultimate issue involved in [discrimination] cases" but that "the report is in no

sense binding on the district court and is to be given no more weight than any other testimony given at trial." *See id.* at 157. The court also recognized the court's discretion in admitting such reports and actually compared the EEOC report to accident reports admissible under the Federal Business Records Act. *See id.* Although these reports are similarly prepared in "the regular course of the Commission's business and in accordance with express statutory authority," this regularity does not by itself, "require admissibility." *See id.* at 157-58.

The Eighth Circuit similarly follows this discretionary view. "It would be ill-advised to shackle the discretion of the trial judges with a rule of *per se* admissibility" since EEOC determinations are of varying quality and therefore, the admission of "EEOC reasonable cause determinations is to be left to the sound discretion of the trial court." *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984). Even an EEOC reasonable cause determination does not eliminate the trier of fact's position as the ultimate decision maker.

The question of whether an EEOC letter of violation or an EEOC determination of reasonable cause creates a genuine issue of material fact concerning whether the defendant discriminated against the plaintiff, or precludes a court from concluding that no reasonable fact finder could find discrimination, is not a question that needs to be answered by this Court. The circuits are consistent in their conclusion that the trier of fact is the ultimate decision maker. Whether that person(s) finds the EEOC finding probative, and in fact probative enough to allow the nonmoving party to survive summary judgment, is a case specific question that can continue being answered using the specific facts of the case. No matter whether the circuit has a *per se* admissibility rule, or leaves this admission to the court's discretion, petitioner can point to no circuit that mandates that

every plaintiff that presents an EEOC probable cause finding or letter of violation must survive summary judgment. Such a mandate is prohibited by the very rules petitioner relies on for her position. This Court cannot take away the trial court's function of weighing the evidence and determining if there is a genuine issue of material fact that requires the case to move past summary judgment. That is a determination that has always, and must always be left with the trier of fact. There is no need for this Court to settle a nonexistent disagreement among the circuits or disturb a sound discretionary policy.

**2. Petitioner did not raise the EEOC letter of violation issue at the Eighth Circuit level and so cannot raise it before this Court.**

Generally, a federal appellate court does not consider an issue not passed upon below. *See Singelton v. Wulff*, 428 U.S. 106, 120 (1976). Although it is within the court's discretion to consider an issue not raised in the trial court, that discretion should be used sparingly. *See United States v. Latrobe Construction Co.*, 246 F.2d 357, 362 (8th Cir. 1957). Petitioner did not raise the issue concerning the court's consideration of her EEOC letter of violation and should be deemed to have abandoned any such argument. *See e.g., Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F.2d 130, 133 (8th Cir. 1951). Respondents' have had no opportunity to present evidence they believe is relevant to this issue and have in essence been "surprised." *See Singelton*, 428 U.S. at 120. Petitioner's Eighth Circuit argument was void of any reference whatsoever to the EEOC letter of violation, or the district court's failure to give sufficient weight to that letter in its summary judgment decision. This Court should use its discretion to deem the EEOC issue abandoned and therefore, not properly before this Court.

**3. The Eighth Circuit Panel did not depart from the mandate of *Reeves v. Sanderson* when it determined that even when giving credence to the petitioner's evidence, and taking the evidence which tends to support petitioner's case, the record as a whole did not support an inference of intentional discrimination.**

*1. The Panel's method of analyzing a summary judgment motion was perfectly in line with Reeves v. Sanderson, as well as other case law when it drew all inferences in favor of the petitioner and still found that summary judgment was appropriate.*

The *Reeves* decision reiterated the longstanding principle that "a court should render judgment as a matter of law when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson*, 120 S. Ct. 2097 (2000) (quoting Fed. Rule Civ. Proc. 50(a))(internal quotations excluded). In making this decision the court "must review the records taken as a whole." *Reeves*, (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Even after this favorable review, summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 971 (8th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The moving party is entitled to judgment as a matter of law as long as he/she carries his/her burden of showing the absence of a genuine issue of material fact. *See Lynn v. Deaconness Medial Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998).

In discrimination cases, there are duel burdens because the moving party bears the burden of showing the absence of a genuine issue of material fact, and the plaintiff retains at all times the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination. *See id.* If the plaintiff cannot carry this burden, the moving party will prevail.

The Eighth Circuit was perfectly in line with summary judgment case law when it found that the petitioner's pretextual evidence was insufficient to reject the respondent's legitimate, nondiscriminatory reasons for her termination. In reviewing the decision, the panel could not duplicate the district court's function by making its own determination of facts and reversing even if it would have decided the case differently. *See Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1212 (8th Cir. 1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* The panel even considered certain evidentiary material that the district court had decided was irrelevant, and yet still found that the petitioner failed to carry her burden, and that respondent was entitled to summary judgment. The district court's account of the evidence was plausible in light of the record viewed in its entirety. *See Anderson v. City of Bessemer*, 470 U.S. 564 (1985). There were no credibility determinations made by the panel. The panel fully heard the issues, was sympathetic to petitioner's claim, but was left with the conclusion that there were no legally sufficient evidentiary bases for a reasonable jury to find for the petitioner. Based on petitioner's failure to carry her burden of persuasion, the panel's decision in no way violates *Reeves v. Sanderson*.

2. *The panel weighed all the evidence in favor of petitioner and determined she failed to carry her burden because she did not establish that she was terminated for any other reason than her criminal citation and history of poor performance.*

In a race discrimination suit the pattern of proof is well established. "First, a plaintiff must establish a 'prima facie case' by proving a set of facts sufficient to give rise to an inference of discrimination." *Patterson v. Masem*, 774 F.2d 251, 254 (8th Cir. 1985). Next, the defendant must articulate a legitimate, nondiscriminatory reason for the employment decision. *See id.* Finally, if these first two burdens are met, "the plaintiff is granted an opportunity to show that the justifications offered are but pretexts to conceal the employer's improper motivation." *Id.* (citing *McDonnell Douglas Corp.*, 411 U.S. 792, 802-05 (1973). "The plaintiff at all times retains the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination." *Lynn v. Deaconness Medial Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998). The critical summary judgment inquiry is whether the plaintiff came forward with sufficient evidence "to permit the trier of fact to find that a discriminatory or retaliatory reason motivated the discharge." *Harvey*, 38 F.3d at 971.

The U.S. Supreme Court's *Reeves* decision specifically clarifies that "disparate treatment liability depends on whether the protected trait actually motivated the employer's decision." *Reeves v. Sanderson*, 120 S. Ct. 2097 (2000) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Race or gender must have "actually played a role in [the employer's decision making] process and had a determinative influence on the outcome." *See id.* In deciding whether petitioner has met this burden, "it is not enough . . . to *dis*believe the employer; the factfinder must

*believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993). Even though the Court later clarified this statement by stating that disbelief of the reasons put forward by the defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination, this ultimate inference still depends on the plaintiff presenting evidence that causes the defendant's reasons to be disbelieved. *See id.* at 511. Although the Court reasoned it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the respondent's explanation, petitioner did not present sufficient evidence to show the respondent's reasons were false.

The Eighth Circuit assumed petitioner set forth sufficient evidence to support her prima facie case of discriminatory discharge. However, after thoroughly reviewing the record, the panel concluded that petitioner did not demonstrate that the state's proffered nondiscriminatory reasons for her termination were pretextual. The state met its burden of advancing a legitimate, nondiscriminatory reason for petitioner's termination when it explained that its decision was based on a combination of considerations including: (1) petitioner's conduct at Johnson's home; (2) her poor driving performance; (3) concerns over her accountability; (4) her evasiveness during the investigation of Johnson's complaint; and (5) concern that she might present a disciplinary problem after completion of her probationary period. (Pet. A-171-172) To carry her burden, petitioner had to present evidence that rejected all of the respondents' reasons because anyone alone sustained its burden. As a probationary employee, petitioner could be terminated for anyone of these reasons. (Pet. A-172)

Petitioner was a probationary employee who was cited for criminal damage to property. Petitioner tries to avoid this

criminal citation by claiming she was discharged by respondents for discriminatory reasons, while failing to reconcile the fact that the respondent's were not even involved in the issuance of this citation. As a probationary employee this criminal citation alone was enough to justify her termination. (Pet. A-110, 113) Petitioner believes the actual incident that resulted in the criminal citation was so minor as to not justify her termination. However, it was not for respondents or the panel to question the reasoning behind the issuance of the criminal citation. The citation was issued and later plead guilty to by respondent, and the analysis starts from that point. Captain Mengelkoch explained that it did not matter whether she was issued a citation or not, the behavior that led to that citation was "inappropriate" and resulted in petitioner's dismissal for conduct unbecoming an officer. (Pet. A-110)

Petitioner argues that the respondents made certain misrepresentations to the EEOC and those misrepresentations should support her pretext argument. Specifically, a letter to the EEOC states petitioner was non-certified because she was "arrested" following a domestic incident. (Pet. A-101) This mistaken information is in no way sufficient to find the respondents' asserted justifications for discharge were false. Captain Mengelkoch specifically explained that he knew petitioner was not arrested, and that she was not non-certified because of a criminal arrest. (Pet. A-105-106) This testimony establishes that this mistaken "arrest" statement in no way affected the respondent's decision and therefore, does not support petitioner's pretext argument.

The issuance of the criminal citation resulted in an internal investigation. Petitioner's behavior during this investigation, along with her documented driving deficiencies, provided the respondent with additional support for its termination decision.

Petitioner's traffic violations and driving deficiencies were documented in her very first FTO biweekly evaluation, and continued to be documented into her probationary period. (Pet. A-63-71; Resp. L-34, 37) Petitioner was reported as having difficulty paying attention to traffic signals while operating the patrol car, monitoring the radio and performing her job. (Pet. A-67; Resp. L-27-31) In addition to these continuing driving deficiencies, petitioner demonstrated questionable accountability. (Resp. L-45)

When petitioner was involved in the meter light incident, a fellow trooper reported that petitioner had to be aggressively encouraged to make a report of the incident. (Resp. L-35) Even when petitioner did finally made the report, she was not happy about it. (*Id.*) Fraser also determined petitioner to be less than accountable in her internal investigation interview. (Resp. L-88) When asked about anger management petitioner initially denied she ever saw a counselor, but when Fraser rephrased the question petitioner admitted to seeing a counselor that "specialized in anger management." (Resp. L-66-67, 88) Petitioner also gave differing answers when questioned about the status of her relationship with Steve Johnson. At first she denied that they split up approximately eight weeks prior to the tea-cup incident but when questioned again later, she admitted to being "separated" for approximately six weeks. (Resp. L-54,78) The panel determined that after reviewing the interview with petitioner that it was a reasonable conclusion that petitioner had been evasive and untruthful. However, even if petitioner was truthful during her interview with Fraser, she failed to present evidence that Fraser's conclusions were based on race or gender discrimination. (Pet. Brief at 30) There is no nexus between the conduct that resulted in petitioner's termination and race or gender discrimination.

Finally, respondents were concerned with the disciplinary problem petitioner might present after her probationary period. (Pet. A-172). If petitioner were allowed to proceed past her probationary period she would be covered by the collective bargaining agreement and could only be discipline or discharged for "just cause." Respondents should not have to take the chance that a problem probationary officer will improve when certified. The whole point of the probationary period is to flesh out potential problems and make decisions that produce the best troopers for the patrol. By questioning respondents decision to terminate, petitioner is doing nothing more than attacking the business judgment of respondent in how it chose to evaluate its employees. As long as its choices are not discriminatory, respondent is entitled to these judgments. In this case petitioner could not prove her termination was for discriminatory purposes because she failed to demonstrate pretext with respect to respondents' assertion that, given her probationary status, she was terminated for engaging in conduct unbecoming an officer.

*3. The panel was correct in determining petitioner's proffered "similarly situated" argument did not support her pretext burden.*

Petitioner made an equal protection claim against respondents Fraser and Hodapp under 42 U.S.C. § 1983. She also claims this equal protection argument supports her pretext burden and shows her termination was a product of intentional discrimination. To recover under § 1983, petitioner must show that while acting under color of state law, the respondents deprived her of a right secured by the Constitution. *Hafer v. Melo*, 502 U.S. 21 (1991). "Employees are similarly situated when they are involved in or accused of the same offense and are disciplined in different ways." *Harvey*, 38 F.3d at 972 (citing *Boner v. Board of Comm'rs*, 674 F.2d

693, 697 (8th Cir. 1982)). Petitioner must show that she was treated differently than other similarly situated persons due to her belonging to a protected class. Petitioner claims she was treated differently as a black female probationary employee, but she cannot show that she was treated differently than males or Caucasians. Petitioner presented no evidence that any of the other probationary officers ever received a comparable criminal citation, nor that concerns over their accountability, driving performance or tendency to prevaricate were raised during their probationary period. Petitioner also did not show that they were involved in motor vehicle accidents while they were on patrol. Petitioner's only assertion to support her allegation that she was treated differently from other similarly situated persons was her own unsubstantiated, undocumented statements.

The panel actually disagreed with the district court's conclusion that petitioner only compared herself to nonprobationary troopers, and instead found that the patrol did not discipline several white male probationary troopers when citizen complaints were lodged against the troopers or when disciplinary issues arose. (Pet. Brief at 11,12) However, even after considering all these nonprobationary officers, petitioner's evidence was insufficient to establish pretext or sustain her equal protection claim against Fraser and Hodapp. The record only reflects that two probationary troopers received a single citizen complaint, both of which were investigated and found to be unsustained, and a third received two citizen complaints. (Pet. Brief at 12) Petitioner's misconduct and history were not similarly situated to the other probationary troopers. Additionally, petitioner did not show that the supervisor or supervisors responsible for her termination were also involved in the disciplinary action, or lack thereof, of the white male probationary officers. *See id.* "When different decision-makers

are involved, two decisions are rarely similarly situated in all relevant respects." *Harvey*, 38 F.3d at 972 (citing *Jones v. Frank*, 973 F.2d 673, 676 & n.3 (8th Cir. 1992)).

Petitioner tried to support her equal protection and pretext arguments by comparing herself to nonprobationary troopers, however such comparisons are not probative because the petitioner was not similarly situated with those troopers. *See Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1309-10 (3d Cir. 1993) (recognizing that tenured troopers are not similarly situated to probationary troopers). Petitioner had to serve a one year probationary period before she could be certified. Once a trooper satisfactorily completes the probationary period and becomes a certified trooper, only then can the trooper be protected by Minn. Stat. § 299D.03, subd. 8.[2] Petitioner's Appointment Letter dated February 14, 1995 specifically provides for at-will employment for a period of one year. (Resp. L-1) Therefore, petitioner cannot compare herself to non-probationary members of the patrol whose employment is governed by a collective bargaining agreement and who can only be terminated for "just cause." As the panel concluded, petitioner can only compare herself to probationary troopers and that comparison does not show she was similarly situated to any other probationary trooper, and therefore the panel was correct in determining she was not terminated for discriminatory reasons.

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2. Minnesota Statutes Section 299D.03 provides that the Patrol may not terminate a trooper with six months continuous service except for just cause.

*4. The panel considered petitioner's statistical and minority employment arguments, and her claims concerning the deficiencies in her performance evaluations and found that neither supported a claim of pretext.*

Petitioner contends that the fact that she is the only black female trooper, and one of the few black troopers, ever employed by the patrol is circumstantial proof of pretext. The panel explained that in *Hutson v. McDonnell Douglas Corp.* it recognized that statistical evidence "may support a finding of pretext, particularly where there are independent, direct grounds for disbelieving the employer's explanation for discharge." (Pet. A-13), 63 F.3d 771, 778 (8th Cir. 1995). The Eighth Circuit has similarly recognized the added support of statistical evidence in *Kim v. Nash Finch Co.*, when it found that in addition to other evidence that the proffered reason was false, pretext was established by evidence that out of 3,500 employees, only 2 management employees in 25 years were nonwhite. 123 F.3d 1046, 1059 (8th Cir. 1997). However, in the present situation, the panel determined that the evidence presented by petitioner was insufficient to establish a genuine issue of pretext for two reasons: (1) there was not independent evidence to support a finding of pretext and (2) the generic type of employment statistics presented by petitioner were not probative of the reason for her termination. (Pet. A-13); *See Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999) ("Because overall employment statistics have little bearing on the specific intentions of the employer in making particular hiring decisions such statistical evidence will rarely suffice to rebut an employer's legitimate, nondiscriminatory reasons for a particular adverse employment action."); *see also Hutson*, 63 F.3d at 777 (explaining that the statistical evidence failed to control the variable relied upon by the employer for its discharge of the

employee). Based on these deficiencies the panel found the petitioner failed to present sufficient evidence from which a reasonable fact finder could disbelieve the respondents' nondiscriminatory explanation for her termination.

Petitioner also tried to support her argument in support of pretext by asserting that there is evidence of blatant lies and inaccuracies in the supervisors report recommending her termination. However, this report is merely a recitation of issues and concerns raised by other troopers during petitioner's probationary period, which are supported by the record, and a summarization of the tea-cup incident at Johnson's home. (Pet. A-172-173; Resp. L-98-103) The panel correctly concluded that there was no evidence to support petitioner's argument because there was no evidence related to the report's preparation that would cause a fact finder to question the explanation offered by respondent. (Pet. A-12)

Finally, petitioner claims the panel erred when it failed to conclude that the evidence in the supervisor's report failed to credit the many positive comments in her performance evaluations. Failure to consider every comment contained in performance evaluations is not reversible error, nor does it establish respondents had discriminatory motives in terminating the petitioner. Respondent never denied there were favorable or satisfactory evaluation comments in petitioner's file. However, these comments do not require the respondent to ignore petitioner's deficiencies. The way respondent chooses to do and use its evaluations is a business judgment that petitioner cannot legitimately attack. Petitioner also tries to show respondents "driving deficiency" arguments are pretextual by pointing out commendations from the training academy. (Pet. Brief at 23) This commendation carries little weight in the real patrol world. Petition's performance at the academy is

irrelevant to her performance in the field. Actual field performance requires troopers to coordinate many more skills at a real life pace and does not allow for artificial protections. Petitioner's evaluations establish that she was not as capable a trooper in the field and these inadequacies were very relevant to the certification decision.

In conclusion, neither petitioner's statistical or general policy evidence nor her satisfactory performance evaluation comments prove respondents' legitimate, nondiscriminatory reasons for petitioner's termination are pretextual. Petitioner again failed to carry her burden, and the panel was correct in affirming summary judgment.

## CONCLUSION

The question of whether an EEOC reasonable cause finding automatically projects a genuine issue of material fact into a case is not a question that needs to be addressed by this Court. The answer to this question is obvious and any other answer contradicts the judicial system as we know it. Accordingly, this Court should deny petitioner's petition. Petitioner's petition should also be denied because the Eighth Circuit Court of Appeals did not stray from longstanding summary judgment principles when it determined petitioner failed to carry her pretext burden with respect to her discrimination claims. The record before the panel sufficiently supported its decision as to petitioner's pretext arguments, and therefore its decision need not be overturned. Petitioner has presented no questions or issues that need to be examined by the United States Supreme Court and her petition should be denied.

Respectfully submitted,

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# APPENDIX

# APPENDIX — RELEVANT DOCUMENTS

**[Omitted here but printed separately as Lodging]**